

NO. 48134-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW LAYNE WELLINGTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 14-1-03195-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant is unable to show the trial court abused its discretion in denying defendant's request for a SSOSA when the court believed a SSOSA was not appropriate as it was concerned about the risk to the community, believed the SSOSA would be too lenient of a sentence and the victim's opposed the SSOSA?

B. STATEMENT OF THE CASE.

1. Procedure

On August 14, 2014, the Pierce County Prosecutor's Office charged MATTHEW LAYNE WELLINGTON, hereinafter "defendant", with four counts of rape of a child in the first degree, domestic violence related. CP 1-3. On July 17, 2015, pursuant to a plea agreement, the State filed an amended information and defendant pleaded guilty to two counts of rape of a child in the first degree, domestic violence related. CP 8-9, 11-22; RP 2-7.

Sentencing was held on September 4, 2015, before the Honorable James Orlando. RP 8. The State recommended 131 months in each count to run concurrent to one another, and defendant requested a Special Sex Offender Sentencing Alternative (SSOSA) pursuant to RCW 9.94A.670. CP 11-22; RP 18. The victim's mother read a statement to the court

during sentencing and expressed her opposition to the SSOSA. RP 12-18. The court reviewed a psycho-sexual evaluation and treatment plan prepared by Michael Comte who believed defendant would be amenable to a SSOSA. RP 20-28. The court also reviewed a sexual history polygraph and a pre-sentence report prepared by the Department of Corrections which did not object to defendant's request for a SSOSA. RP 23-28, 31. For some reason, none of these documents were filed with the court.

After hearing from both attorneys and the defendant, the trial court denied defendant's request for a SSOSA. RP 37-41. Citing the level of sophistication, the number and extent of the acts committed by defendant, and the position of trust defendant used to manipulate his victim, the court stated it was concerned with the community safety and felt the SSOSA sentence would be too lenient in light of the actions of the defendant. RP 28-41. The court also gave great consideration to the victim's opposition to the SSOSA and her and her mother's fear of defendant before determining that a SSOSA would not be an appropriate sentence for the defendant. RP 37-41. The court imposed the State's recommendation of 131 months to life. RP 40-41. Defendant filed a timely notice of appeal. CP 48-64.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR A SSOSA AFTER CONSIDERING NUMEROUS FACTORS AND FINDING A SSOSA WAS NOT APPROPRIATE FOR THE DEFENDANT.

Under the Sentencing Reform Act of 1981 (SRA), certain sex offenders are eligible to receive a Special Sexual Offender Sentencing Alternative (SSOSA) provided they meet the qualifications in RCW 9.94A.670. Once they are determined to be eligible for a SSOSA, the defendant may undergo a psycho sexual examination and report detailing his amenability to treatment and relative risk to the community and sets forth a proposed treatment plan. In determining whether to order the defendant to a SSOSA, the court:

shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section.

RCW 9.94A.670(4). The court is also required to give great weight to the victim's opinion about whether the offender should receive a SSOSA and

“[t]he fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment.” RCW 9.94A.670(4).

SSOSA is intended for offenders who have committed less serious crimes and “is not to be used in the aggravated case, but rather is limited to offenders who may be considered acceptable risks.” *State v. Goss*, 56 Wn. App. 541, 544, 784 P.2d 194 (1990). The trial court is not required to give reasons for its determination or to enter any findings. *State v. Hays*, 55 Wn. App. 13, 15-16, 776 P.2d 718 (1989). It is also not bound by any expert opinion. *State v. Toomey*, 38 Wn. App. 831, 837, 690 P.2d 1175 (1984) (“The court, no the particular expert ... makes the decision.”), *review denied*, 103 Wn.2d 1012, *cert. denied*, 471 U.S. 1067 (1985).

The decision whether to sentence a defendant to a SSOSA is reviewed for an abuse of discretion. *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Adamy*, 151 Wn. App. 583, 587, 213 P.3d 627 (2009) (*citing State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)). A decision which applies the incorrect legal standard is a decision based on untenable grounds or made for untenable reasons. *Adamy*, 151 Wn. App. at 587 (*citing State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A criminal defendant generally is permitted to appeal a standard range sentence only if the sentencing court failed to follow a procedure required

by the SRA. RCW 9.94A.585(1); *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993).

Defendant in the present case does not challenge his sentence which was within the standard range and concedes the trial court applied the correct legal standard. Brief of Appellant at 5. Instead, he argues that the trial court misunderstood the purpose of the SSOSA and abused its discretion by denying the SSOSA as the result of an emotional response to the victim's mother. *Id.* But defendant not only fails to provide any legal support for this argument, he fails to provide any evidence in the record to support such a claim. A review of the record actually reveals the trial court's decision to deny defendant a SSOSA was well thought out after the consideration of numerous factors. As described above, the trial court is given great discretion in determining whether to order a SSOSA for a defendant. An abuse of discretion occurs if the court's decision is manifestly unreasonable or based upon untenable grounds or reasons. The record in this case shows the trial court's decision to deny defendant a SSOSA was not in any way an abuse of discretion.

The trial court in the present case discussed numerous reasons for its decision about why it did not feel defendant was an appropriate candidate for a SSOSA in spite of its recognition that Mr. Comte felt defendant would be amenable to a SSOSA disposition. RP 38. The trial court referenced the amount of sexual contact involved in defendant's case which involved multiple acts that increased in contact and ended in penile

penetration and involved buying and using sex toys on a six or seven year old child. RP 38. In evaluating whether a SSOSA sentence would be too lenient for defendant's acts, it compared defendant's actions with a situation where there may have been one incident of minimal touching, no penetration and no level of sophistication. RP 38-39.

The trial court also referenced a significant concern for the community after defendant had committed multiple rapes upon a child he proclaimed he loved. RP 39-40. The court noted that increased its concern about defendant being in the community with other young victims and other women he may come into contact with who have children. RP 39-40. The court also discussed the level of sophistication in committing these acts which involved disabling security cameras or disrupting the internet connection and bringing the child into his room while her grandmother slept, again increasing the concern for the community. RP 39. The court also considered the defendant's sexual history which involved a long history of aberrant sexual activities, including viewing child pornography, excessive masturbation and contact with animals. RP 39.

Finally, the court discussed the considerable weight it is required by statute to give to the victim's opinion. RP 40. It referenced the victim and her mother's strong opposition to the SSOSA and their fear of the defendant. RP 40. The court recognized the defendant's lack of prior sexual history, the defendant's ability to change and Mr. Comte's opinion

that the defendant would be amenable to treatment, but respectfully disagreed as it is allowed to do. *Toomey*, 38 Wn. App. at 837. After consideration and discussion of many of the factors on the record, the court concluded that:

under these circumstances, evaluating the risk to the community, whether this is too lenient a sentence to receive a SSOSA, I think that, coupled with the multiple acts of sophisticated nature and the victim's wishes, make him in my mind not an appropriate candidate for SSOSA.

RP 40.

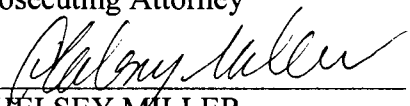
It is apparent from the record that the trial court's decision to not order a SSOSA for defendant was not an emotional response to the victim's mother. The trial court denied the SSOSA after engaging in a thoughtful and well-reasoned analysis of the factors it was required to consider because it did not feel defendant was an appropriate candidate. The trial court's actions were not manifestly unreasonable or based upon untenable grounds or reasons. Defendant is unable to show the trial court abused its discretion in denying the SSOSA.

D. CONCLUSION.

For the forgoing reasons, the State respectfully requests this Court affirm defendant's convictions and sentence.

DATED: June 1, 2016.

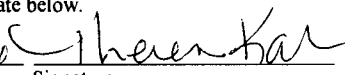
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The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature

PIERCE COUNTY PROSECUTOR

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